IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

Docket No: 34219

STATE OF WEST VIRGINIA,
Appellee,

V.

JOSEPH FRITACHE WHITE,
Appellant.

APPELLANT'S REPLY TO BRIEF OF APPELLEE

Now would come the Appellant, by the undersigned counsel, and would reply to the brief of the Appellee as follows:

I. Counsel did not knowingly agree to admission of the evidence. Counsel did not know an extra page had been added to the statement. As earlier cited, the prosecutor (now Judge Lynn Nelson) stated he had never seen the last page of the statement before and he did not know it was to be introduced.

II. Counsel did examine the statement summarily but not page by page and it appeared to be the same statement I had been provided so there was no objection. I did not at the time think to see if a page had been added. I had no reason or basis for such a thought. While Appellee seems to doubt the fact that the statements provided to me did not include the last page, it is the truth and apparently the prosecutor had never seen the last page prior to trial.

III. The entire brief is dedicated to the reasons a mistrial should have been granted, or in the alternative a new trial awarded. The brief discusses three specific reasons a mistrial was appropriate. That is the sole purpose and function of the brief to

convince the Court mistrial did in act occur. I admit the brief could have been formally more perfect.

Even if the Court chooses to disregard the brief, the Petition for Appeal contains all factual and legal basis necessary for the Court to determine a mistrial and miscarriage of justice has occurred. Is it difficult to conclude the brief supports the issue raised in the petition? It is the only logical conclusion. Attempting to support a miscarriage of justice by a formality or rule of procedure cannot be justified.

IV. There is no credible corroborating evidence. The evidence does make it clear, however, the "victim" was extremely intoxicated and high. She testified she jumped from a vehicle traveling 55 mph and sustained only a scrape on her knee. This is clearly incredible. She would be dead or very seriously injured. The Defendant does not deny having sex with her but denies he forced her to participate. There is nothing credible to corroborate the use of force.

V. The error is plain error. Telling a jury in a rape case the Defendant is a registered sex offender is error. Nobody can assume the jury chose to ignore the fact the Defendant was a sex offender. Human nature and common sense tell us exactly the opposite. Of course the record is devoid of any evidence the jury relied on the sex offender information because there is no Court reporter in the jury room . It would never be a part of the record.

VI. If the state is correct this is all my fault. I failed to object to the evidence and I have committed an error of form on the face of the brief filed. If so, an ineffective assistance of counsel claim would succeed and obtain the same result. I do not, however admit being ineffective. As stated many times, neither myself nor the

prosecutor were aware of the last page of the Statement. It was a mistake and both counsel and the prosecutor acted in good faith. The Attorney General's office can contact Judge Nelson for verification at any time.

Respectfully submitted

JOSEPH FRITACHE WHITE
APPELLANT, BY COUNSEL

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CERTIFICATE OF SERVICE

I, Timothy M. Sirk, a practicing attorney, do hereby certify that I served a true copy of the foregoing ***Appellant's Reply to Brief of Appellee*** upon the Plaintiff by mailing a true copy thereof by Untied States First Class mail, postage prepaid, on this the 18 day of February, 2009, addressed as follows:

R. Christopher Smith, Esq.
Assistant Attorney General
State Capitol Room 26E
Charleston WV 25305

TIMOTHY M. SIRK